Supreme Court, U.S.
FILED
JUL 12 1999
OFFICE OF THE CLERK

(2)

No. 98-1987

In The
Supreme Court of the United States

ROBERT VALDESPINO; BRENDA ROLON,

Petitioners,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED

1. Should this Court alter the threshold test it adopted in *Thornburg v. Gingles* to recognize a claim that a plaintiff group's ability to elect is diluted even though the group is not sufficiently large and geographically compact such that it can constitute a majority in a single-member district?

2. Are the unanimous opinions of the four courts of appeals that have addressed the issue incorrect in determining that the *Thornburg v. Gingles* threshold analysis of whether a group can constitute a majority in a single-member district should be limited to consideration of the universe of persons potentially eligible to vote – *i.e.*, to the citizen-voting-age population?

3. Is it an appropriate exercise of this Court's jurisdiction to resolve factual disputes under a legal standard that is not significantly disputed?

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BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the Fifth Circuit's decision and opinion in *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999).

STATEMENT OF THE CASE

The Statement of the Case presented by the plaintiffs[1] is generally correct, although incomplete. Only when read in conjunction with the factual discussion found in the Fifth Circuit's opinion does the plaintiffs' Statement of the Case provide a summary of the relevant facts.

Alamo Heights[2] does object to the plaintiffs' references to "admittedly wrong population projections" and "admittedly erroneous population projections" found on page three of the Petition. These references erroneously suggest that Dr. Rives, the demographic expert witness presented by Alamo Heights, admitted that his report, which the district court relied on as the basis for its

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[1] The petitioners/plaintiffs in this case are Robert Valdespino and his wife, Brenda Rolon. For ease of reference, they will be referred to in this brief in opposition as "plaintiffs."

[2] The respondents/defendants in this case are the Alamo Heights Independent School District and the seven members of its board of trustees. They will be referred to in this brief in opposition as "Alamo Heights."

findings, was incorrect. No such admission occurred. Furthermore, the Fifth Circuit explicitly rejected the plaintiffs' claim on this point as "overstated."[3] Dr. Rives prepared a report in April 1997 that was based on Alamo Heights apartment occupancy data available at that time. In late July, more recent data became available to the parties, and Dr. Rives updated his report with the new data. He also corrected a computation error in the earlier report. During the trial of the case, the plaintiffs claimed surprise because they received the August report a little more than a month before the beginning of the trial. Accordingly, the district court, "to take the approach most favorable to the Plaintiffs," limited its consideration to the April report.[4] Thus, the use of the so-called "admittedly wrong" report was simply a function of the district court's acceding to the plaintiffs' request that it rely on the report that was prepared with slightly less current data. Further, as the Fifth Circuit recognized, it made no difference which report was used, because the underlying conclusion in both was the same: the plaintiffs could not constitute a majority and thus failed to satisfy the *Thornburg v. Gingles* threshold inquiry.[5]

SUMMARY OF ARGUMENT

The plaintiffs cite several reasons why the Court should grant their Petition for a Writ of Certiorari and

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[3] App. at 11a.

[4] App. at 30a n.4.

[5] *Id.* at 11a.

review the opinion of the Fifth Circuit. None of their arguments merit this Court's attention.

First, the plaintiffs contend that the Fifth Circuit misapplied this Court's vote dilution jurisprudence under *Thornburg v. Gingles*.[6] The Fifth Circuit's opinion, however, is a textbook example of *Gingles* analysis. In *Gingles*, the Court imposed a threshold requirement on plaintiffs bringing vote dilution claims under section 2 of the Voting Rights Act. The first prong of the requirement is that the group represented by the plaintiffs be capable of constituting a majority in a single-member district. The purpose of the threshold majority requirement is to establish a causal relationship between the plaintiffs' alleged vote dilution injury and the use of the challenged at-large election system. Under this Court's well-established jurisprudence, plaintiffs cannot bring a *Gingles* "ability-to-elect" claim absent a threshold showing that they can constitute a majority. These plaintiffs brought a *Gingles* ability-to-elect claim, but they were unable to meet the *Gingles* threshold majority test. The Fifth Circuit properly applied this Court's vote dilution precedents and rejected the plaintiffs' claim.

Second, the plaintiffs contend that the Fifth Circuit erred in considering citizenship when determining if Hispanics could constitute a majority in a single-member district. Although this Court has never explicitly ruled on this issue, the Fifth Circuit's approach is entirely consistent with both Congressional intent in enacting the Voting Rights Act and with this Court's voting rights cases. The

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[6] 478 U.S. 30 (1986).

Voting Rights Act extends its protections only to citizens. The *Gingles* threshold test is designed to measure potential *voting* strength – a benchmark that necessarily requires consideration of citizenship, since only citizens can vote. Furthermore, the Fifth Circuit is not alone in reaching this conclusion. All of the circuits to address this issue – the Fifth, Seventh, Ninth, and Eleventh Circuits – have concluded that citizenship is a proper part of the *Gingles* threshold analysis. The circuits are unanimous, and legally correct, in their reasoning. There is no split to resolve, nor any misapplication of precedent for this Court to address.

The plaintiffs seek to obtain an evidentiary, case-specific ruling from this Court concerning the methodology used by Alamo Heights' demographic expert. This is not an issue that merits this Court's attention. The plaintiffs object to the expert's reliance on evidence of post-census changes in the Alamo Heights population in the period after the 1990 census and up until trial. The plaintiffs do not dispute that use of post-census figures is permissible in appropriate cases, and they do not truly challenge the substantive legal standard applied by the district court or the Fifth Circuit in making that evidentiary call. They simply object to the evidentiary result. The plaintiffs' fact-based objections are unfounded; however, even assuming their objections had merit, this case-specific quarrel over the weight of the evidence is not appropriate for resolution by this Court, and comes nowhere near any of the standards articulated in Supreme Court Rule 10(a).

In short, the plaintiffs present no legal questions that merit a grant of certiorari. The central issue in this case –

the standard for ability-to-elect claims under *Gingles* – is controlled by well-settled precedent from this Court. The Fifth Circuit decided the tangential issue of use of citizenship within the *Gingles* test in precisely the same manner as all the other federal courts of appeal that have addressed the issue. That decision is entirely consistent with this Court's jurisprudence and Congressional intent. Finally, the purely evidentiary issue of the propriety of relying on post-census data, given changes in the Alamo Heights population since 1990 and up until trial, is a fact question confined to the parameters of this particular case. None of these issues merit the Court's attention. The Petition should be denied.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit properly applied the *Gingles* threshold requirement that a plaintiff group be able to show that it can constitute a majority in a single-member district.

This Court, in *Thornburg v. Gingles*,[7] set out three necessary preconditions that plaintiffs must meet in a suit brought under section 2 of the Voting Rights Act[8] before they can establish that an at-large election system results in vote dilution. The first necessary precondition is that "the minority group must be able to demonstrate that it is

[7] 478 U.S. 30 (1986).

[8] 42 U.S.C. § 1973.

sufficiently large and geographically compact to constitute a majority in a single-member district."[9] In the Petition for Writ of Certiorari, the plaintiffs primarily complain that the district court and Fifth Circuit were "inflexible" in applying this first prong of the *Gingles* threshold analysis. Their specific objections are: (1) a plaintiff group should not be held to a "bright-line" test requiring it to constitute 50 percent of the relevant population of a putative district, so long as it can show that it has the potential to elect candidates of its choice in the district; and (2) citizenship should not be considered when determining if the group is sufficiently large to constitute a majority. The Court should decline the invitation to consider either facet of plaintiffs' claim.

A. The *Gingles* test is conducted in two phases, and a plaintiff must satisfy the threshold majority requirement before the court conducts its functional and searching review of the totality of the circumstances.

Plaintiffs complain that the Fifth Circuit rejected this Court's and Congress' command to employ a "searching, functional, and comprehensive" analysis and instead established a "mechanical, unbending 'bright-line' test."[10] Alamo Heights does not dispute that Congress and this Court have mandated that a section 2 analysis be searching and functional.[11] *Gingles*, however, provides a

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[9] *Gingles*, 478 U.S. at 50.

[10] Pet. at 10.

[11] *Gingles*, 478 U.S. at 45.

specific structure for that searching and functional analysis.[12] Before looking to the totality of the circumstances and performing the comprehensive analysis demanded by the Voting Rights Act, a court must first find that the plaintiff has satisfied the threshold standard necessary to bring a section 2 case. A threshold standard, by its very nature, provides an objective, fixed measure.[13] Once the threshold standard or necessary precondition is satisfied, then, and only then, does the court perform its more comprehensive and searching analysis. There is nothing about the district court's or the Fifth Circuit's decisions in this case that is inconsistent with the requirement that the section 2 analysis be searching, functional, or comprehensive. To the contrary, these courts performed the analysis in precisely the manner mandated by this Court, ensuring that the plaintiffs met the necessary preconditions for a section 2 claim before proceeding further.

B. To pass the *Gingles* threshold, the plaintiff group must be able to establish that its injury is caused by the use of the at-large election structure; it makes this showing by demonstrating that it can constitute a numerical majority in a putative single-member district.

The district court and the Fifth Circuit properly applied the *Gingles* requirement that the plaintiff group be able to establish that it can constitute a majority in a putative single-member district. Only by making this

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[12] *Johnson v. DeGrandy*, 512 U.S. 997, 1010 (1994).

[13] *Holder v. Hall*, 512 U.S. 874, 889 (1994) (O'Connor, J., concurring).

threshold showing does a plaintiff group establish its potential to elect candidates in the absence of the at-large system and, thus, raise the possibility that its vote dilution injury is caused by the use of the at-large system.[14] In fashioning this threshold requirement in *Gingles*, the Supreme Court,[15] the district court that originally considered the case,[16] and the commentators on whom the Supreme Court relied for much of the test,[17] all focused on the ability of members of the racial minority group to constitute a majority if a single-member district were drawn. None suggested, as the plaintiffs do here, that a

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[14] *Gingles*, 478 U.S. at 50-51 n.17.

[15] *Id.*

[16] *Gingles v. Edmisten*, 590 F. Supp. 345, 381 n.3 (1984), *aff'd in relevant part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986) ("[N]o aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority.").

[17] James Blacksher & Larry Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L. J. 1, 55 (1982) ("[M]inority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters") *quoted in Gingles*, 478 U.S. at 51 n.17. Blacksher and Menefee also illustrated the requirement that the majority be composed entirely of members of the plaintiff group, rather than made up of a coalition including cross-over voters, when they cited an example from a Dallas, Texas, case in which Hispanic voters were unable to state a claim because they could not constitute a majority in a single-member district and thus "could not be assured of having their choices succeed *solely* on the weight of their ballots," even though they were successful at coalition politics. Blacksher & Menefee, *supra* at 58-59 n.339 (emphasis added).

racial minority group could satisfy the threshold requirement with less than a majority.

"Majority" has a precise numerical meaning – namely, more than 50 percent. In choosing a "majority" standard, the Court determined that ability-to-elect claims would be justiciable when a group could exceed fifty percent in a putative district. The Court has never indicated that a cognizable claim exists when a group constitutes less than a majority, but is able to exert its will through coalition politics.[18] An objectively defined standard for justiciability like the *Gingles* threshold requirement is crucial in cases arising from the "political thicket" surrounding districting issues. It permits courts to exercise jurisdiction over cases in which vote dilution is a product of the structure of the election system, but not over cases in which the alleged dilution is the product of politics or other factors not appropriate for judicial resolution.

In *Gingles*, this Court firmly established that the first prong of the threshold test requires a numerical majority when it recognized the existence of an "ability-to-elect claim" and distinguished it from a hypothetical "ability-to-influence claim."[19] In an ability-to-elect claim, which is the cause of action the plaintiffs pled and tried, the racial minority group must establish that it can constitute a majority in a single-member district. By contrast, where the allegation is that the group is not a majority that can independently control the electoral outcome, but rather is

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[18] *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998).

[19] *Gingles*, 478 U.S. at 46 n.12.

a substantial minority that can elect the candidates of its choice with cross-over support from white voters, the claim is characterized as an ability-to-influence claim.[20]

The plaintiffs have never suggested that they are bringing an ability-to-influence claim. This is not surprising since this Court has merely assumed, but never decided, that such a claim exists,[21] and the two circuits that have considered the issue have both rejected the existence of an influence claim.[22] The plaintiffs made a strategic litigation choice in the district court and circumvented the uncertainty of an ability-to-influence claim by pleading and trying an ability-to-elect claim. Now, they apparently seek to circumvent the clearly established majority threshold requirement of an ability-to-elect claim by suggesting in this Court that ability-to-influence principles be imported into the *Gingles* test for an ability-to-elect claim. The new, hybrid standard they promote is unprecedented in this Court or any federal court of appeals. The Fifth Circuit correctly applied *Gingles* and its progeny. There is no reason for this Court to overrule

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[20] *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming, *arguendo*, that an "influence-dilution claim" was actionable and stating: "The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority.").

[21] *Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994); *Voinovich*, 507 U.S. 146 at 154; *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993); *Gingles*, 478 U.S. at 46 n.12.

[22] *Cousin*, 145 F.3d at 828; *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988).

Gingles and create the hybrid standard urged by the plaintiffs.

C. There is no reason to revisit the issue of whether citizenship should be considered when determining the first prong of the *Gingles* threshold analysis.

After *Gingles* was decided, courts faced the issue of whether the majority requirement in the first prong of the analysis was to be evaluated on the basis of population or of voting-age population. As the Fifth Circuit reasoned:

> The *raison d'etre* of *Thornburg* and of amended § 2 is to facilitate the participation by minorities in our political processes, by preventing dilution of their votes. Only voting age persons can vote.[23]

Similarly, only citizens may vote. If the *Gingles* threshold test is designed to measure voting potential, it is necessary to apply it to the potential *voting* population – *i.e.*, voting age citizens. This approach is consistent with the Congressional intent, since the Voting Rights Act expressly limits its protection to citizens.[24]

Citizenship is not an issue in every case, since it becomes relevant only when there is a significant difference between the citizenship percentage of the majority group and that of the minority group. However, every circuit, when the issue has arisen, has determined that

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[23] *Brewer v. Ham*, 876 F.2d 448, 452 (1989).

[24] 42 U.S.C. §§ 1973(a) and (b).

citizenship is an appropriate part of the *Gingles* threshold analysis.[25]

There is no reason for this Court to reexamine an issue on which the federal appellate courts universally agree and on which their reasoning is clearly correct.

D. The Fifth Circuit did not create a "new rule" that limits or restricts plaintiffs from bringing claims under section 2 of the Voting Rights Act.

Contrary to the plaintiffs' allegations, the Fifth Circuit has not created a new rule or "foreclosed an important cause of action under Section 2 of the Voting Rights Act to Hispanic citizens."[26] The rule applied by the Fifth Circuit is this Court's rule in *Gingles* – *i.e.*, that a plaintiff group must be large enough to constitute a majority in a single-member district. Undoubtedly, there will be instances in which minority groups – Hispanic or otherwise – will be precluded from pursuing a claim because their members are not sufficiently numerous or geographically compact so as to be able to constitute a majority in a single-member district. That, however, is the nature of a threshold test and has been the case since the *Gingles* necessary preconditions were announced in 1986. The plaintiffs here could not meet the *Gingles* majority

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[25] *See, Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989), *abrogated on other grounds, Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc).

[26] Pet. at 8.

requirement; however, groups in other communities have satisfied the requirement and will continue to do so.

Nor will concerns about the accuracy of census citizenship data and the timing of its release preclude relief to voting rights plaintiffs.[27] Certainly, as the plaintiffs have observed, citizenship data released by the census provide only a "snap-shot view of citizenship levels in 1990, and thus does not take into account changes in citizenship levels since 1990. . . . "[28] However, voting rights plaintiffs who believe that citizenship data are inaccurate because of timing or other reasons can offer evidence indicating the need to depart from census citizenship numbers, just as Alamo Heights offered evidence that clearly convinced the district court to depart from outdated 1990 census population figures in favor of more recent and more accurate numbers.

Plaintiffs set forth a "parade of horribles" that they envision will flow from the Fifth Circuit's decision. That decision, however, is a routine application of *Gingles*, and the "horribles" identified by plaintiffs are the standard hurdles faced by any voting rights plaintiff, or defendant, who litigates a section 2 case. The Fifth Circuit has followed well-established voting rights jurisprudence, and its decision produces both the same barriers and the same opportunities for voting rights plaintiffs that exist under the case law of the other federal circuits and of this Court.

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[27] Pet. at 7.

[28] *Id.*

II. The Petitioners claim that the Fifth Circuit decision conflicts with opinions of this Court or of other circuits is wholly without merit.

A. The Fifth Circuit's opinion is entirely consistent with this Court's jurisprudence.

The plaintiffs complain that the Fifth Circuit's "mechanical, unbending 'bright-line' test for evaluating the *Gingles I* threshold factor is inconsistent with the teachings of this Court. . . . "[29] The primary authority for this statement is the broad admonition in *Voinovich v. Quilter*[30] that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."[31] The key to the statement, however, is the Court's reference to "the nature of the claim." The claim in *Voinovich* was a hypothetical ability-to-influence claim. By contrast, the *Gingles* requirement that a plaintiff group be able to constitute a majority in a putative single-member district arose in the context of an ability-to-elect claim, which is the type of claim plaintiffs brought here. If a voting rights plaintiff brings an ability-to-influence claim – the type of claim at issue in *Voinovich* – then a modification to the *Gingles* threshold is required. Because plaintiffs here did not assert an ability-to-influence claim, there was no need for the Fifth Circuit to make a modification. The Fifth Circuit applied classic ability-to-elect analysis to plaintiffs' classic ability-to-elect claim.

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[29] Pet. at 10.

[30] 507 U.S. 146, 158 (1993).

[31] *Id.*

Although plaintiffs also cite *Bush v. Vera*[32] for the proposition that "the complexity of the districting process [is] such that bright-line rules are not available,"[33] they quote *Bush* out of context. From the rest of the quoted sentence from *Bush*, it is evident that the Court was discussing the interaction between the districting process and the relatively recent *Shaw v. Reno*[34] jurisprudence. *Bush*'s statement about a specific *Shaw v. Reno* issue cannot be transformed into a blanket conclusion that bright-line rules do not apply to the *Gingles* threshold analysis.

The Fifth Circuit carefully and correctly applied this Court's jurisprudence to the issue plaintiffs presented. There is no reason for the Court to grant the petition.

B. The circuit conflicts claimed by the petitioners do not exist.

The plaintiffs claim that four cases are in conflict with the Fifth Circuit's opinion.[35] Although plaintiffs attempt to manufacture conflicts from quotations taken out of context, discussions of issues irrelevant to the issues in this case, and dictum in a concurring opinion, an examination of each of the four cases reveals that no conflicts in fact exist.

Solomon v. Liberty County – Eleventh Circuit – The plaintiffs claim the Eleventh Circuit's en banc decision in

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[32] 517 U.S. 952, ___, 116 S. Ct. 1941, 1964 (1996).

[33] Pet. at 10.

[34] 509 U.S. 630 (1993).

[35] Pet. at 10-11.

Solomon v. Liberty County[36] is in conflict with the Fifth Circuit's decision. Specifically, they assert that the "en banc court . . . determined that . . . a minority group that cannot establish that it is an absolute majority of a single-member district may still bring an action under the Voting Rights Act so long as it can demonstrate that it has the potential to elect in its demonstration district."[37] The plaintiffs, however, misrepresent what the Eleventh Circuit decided.

First, it is simply wrong to say that the Eleventh Circuit adopted this position. The en banc court in *Solomon* was equally divided 5-5. The passage that the plaintiffs cite comes from a specially concurring opinion in which less than a majority of the court joined. Second, the statement that the plaintiffs rely on is dictum. The Eleventh Circuit was never called upon to decide whether the first prong of the *Gingles* analysis could be satisfied even though the plaintiff group could not constitute an absolute majority of a single-member district. In fact, it was undisputed in that case that the plaintiffs made up a majority of the voting age population of a potential district.[38]

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[36] *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (en banc).

[37] Pet. at 10-11. Although the petition quotes from *Solomon*, it does not give the page number where the quotation can be found. The quotation appears in footnote 7 on page 1018.

[38] *Solomon*, 899 F.2d at 1013 (per curiam); *id.* at 1018 (Kravitch, J., specially concurring) ("[T]he undisputed evidence shows that blacks would constitute a majority of District 1's voting age population.").

Sanchez v. State of Colorado – Tenth Circuit – The alleged *Sanchez*[39] conflict arises not from any inconsistency with the Fifth Circuit's opinion, but from a purported clash between the *plaintiffs'* own argument that the Fifth Circuit employed a "rigid approach" to the *Gingles* analysis, whereas the Tenth Circuit observed that "the Circuits have been flexible in assessing the showing made for [the first *Gingles*] precondition."[40] In other words, plaintiffs cite the language used by the Tenth Circuit in contrast to their *own* characterization of the Fifth Circuit's analysis as "rigid." No conflict within the contemplation of Rule 10(a) exists between the Fifth and Tenth Circuits.[41] Furthermore, the Tenth Circuit's language concerning flexibility does not even relate to the issue before the Fifth Circuit. *Sanchez* discussed the need to be flexible when determining if a proposed district was *compact*.[42] By contrast, the issue the Fifth Circuit faced was whether the plaintiff group constitutes a *majority*. Compactness was never an issue.

Uno v. City of Holyoke – First Circuit – The plaintiffs claim that *Uno*[43] conflicts with the Fifth Circuit opinion because "the court approved a finding that plaintiffs had met the *Gingles I* requirement by producing an Hispanic majority voting age population district and by showing

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[39] *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996).

[40] Pet. 10 (quoting *Sanchez*, 97 F.3d at 1311).

[41] SUP. CT. RULE 10(a).

[42] *Sanchez*, 97 F.3d at 1311-12, 1314-15.

[43] *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir. 1995).

BEST AVAILA

that such district consistently elected Hispanic candidates."[44] There is nothing in either the First Circuit's opinion, or the *Uno* district court opinion, to suggest more flexibility in the analysis of the majority requirement than that applied by the Fifth Circuit, or, for that matter, any difference at all in the way the First and Fifth Circuits interpreted the first prong of the *Gingles* threshold analysis. The *Uno* plaintiffs constituted far more than a majority, and they did so in a much larger area than a single-member district.[45] There was no question that the *Uno* plaintiffs met the majority threshold requirement. The district court in *Uno* expressly noted that the first prong of *Gingles* was "not vigorously disputed" and that the issue was "academic."[46]

King v. State Board of Elections – Northern District of Illinois (three-judge court) – The plaintiffs claim a conflict with *King v. State Board of Elections*[47] because that case "specifically rejected the use of citizen-voting-age population as the *exclusive* measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor."[48] First, the *King* opinion was vacated by this Court, so it no longer has any viability and thus could not form the basis for any conflict.[49] Second, the *King* court did not reject the use of citizen-voting-age population as an appropriate

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[44] Pet. at 11.

[45] *Uno v. City of Holyoke*, 880 F. Supp. 911, 919 (D. Mass.), *vacated on other grounds*, 72 F.3d 973 (1st Cir. 1995).

[46] *Id.* at 925.

[47] 979 F. Supp. 582 (N.D. Ill. 1996) (three-judge court).

[48] Pet. at 11.

[49] *King v. Illinois Board of Elections*, 519 U.S. 978 (1996).

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measure. Instead, it expressly declined to reach that issue.[50] What *King* did reject was the citizenship population numbers produced by an expert witness who testified that Hispanic citizenship rates were much lower than those shown by the census.[51] This evidentiary ruling, premised on a determination about the credibility of a particular witness, hardly creates a circuit conflict on an unaddressed issue of law. Third, even if *King* were still viable and even if it did hold what the plaintiffs suggest, it could not create a conflict among the "circuits," since it is a decision from a district court. More important, if *King*'s holding were as broad as the plaintiffs contend, it would be contrary to the law of its own circuit – the Seventh Circuit – which, like the Fifth Circuit, now recognizes citizen-voting-age population as the relevant *Gingles* measure.[52]

Even the most cursory review of *Solomon*, *Sanchez*, *Uno*, and *King* reveals that no circuit conflicts exist, and thus there is nothing for this Court to resolve.

III. Plaintiffs' arguments regarding the use of post-census population data merely reflect disagreements with the district court's fact-findings and do not present legal questions that require resolution by this Court.

The core issue at trial was the current population of the Alamo Heights school district. Two especially

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[50] *King*, 979 F. Supp. at 612.

[51] *Id.* at 612 n.58.

[52] *Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998).

significant changes had occurred since the 1990 census was taken. First, an apartment complex, which had accounted for about eighteen percent of the population of the plaintiffs' proposed single-member district, closed. It was extensively remodeled and, after reopening, attracted a tenant base with a much smaller average number of persons per household. As a result, its population was less than half of the 1990 population of the complex. It also had a significantly lower percentage of Hispanic residents in 1997 than it did in 1990. During the same time, there was extensive development on a large tract of land elsewhere in the school district. As a result of these two events, the population required for a single-member district increased, while the population of the district proposed by the plaintiffs both decreased and became less Hispanic. Although these two events were the most significant demographic changes in the school district, Alamo Heights submitted expert analysis designed to reflect *all* population changes in the district. As a result of this testimony, the district court found that it was no longer possible to draw a single-member district with an Hispanic citizen-voting-age population majority.[53]

The plaintiffs recognize that there are times when courts, including this Court, have found that it is appropriate to rely on post-census population adjustments.[54] There even appears to be no substantive disagreement about the legal test employed by the district court. As the Fifth Circuit pointed out:

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[53] App. at 28a.

[54] Pet. at 14-17.

> Except for a cavil, the parties and the district court essentially agree about what standard should be required to overcome census data. As the district court summarized it:
>
> > Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census.[55]

The root of the plaintiffs' contention is that the Fifth Circuit, and presumably the district court, acted "cavalierly" in applying the legal standards to the facts of this case.[56] The centerpiece of their demographic argument is a laundry list of complaints about the expert's analysis and the data on which he relied.[57] Essentially, the plaintiffs disagree with the methodology used by Alamo Heights' demographer and with the particular facts found by the district court.

These fact-based arguments were addressed by the Fifth Circuit and found to be "generally misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in [the demographer's] methodology, or based on the analysis in [the] superseded 1995 reports."[58] Alamo Heights, like the Fifth Circuit, does not believe the plaintiffs accurately and

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[55] App. at 10a (footnote omitted).

[56] Pet. at 17.

[57] *Id.* at 19-23.

[58] App. at 11a.

fairly summarize the demographic evidence. Even if these arguments had any legitimate basis, plaintiffs' highly detailed, case-specific quarrel over the weight of the evidence hardly presents the type of issue that is appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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